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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1969

NO. [redacted] 92

AMERICAN EMPIRE INSURANCE COMPANY OF SOUTH DAKOTA, a South Dakota Corporation, on Behalf of Itself and All Other Insurance Companies Who Were Shareholders in the USAFORM Hail Pool, STUYVESANT INSURANCE COMPANY, a New York Corporation, on Behalf of Itself and All Other Insurance Companies Who Employed U. S. & Foreign Management, Ltd. and USAFORM Pan-American, Ltd. as Reinsurance Brokerage Agents; USAFORM Hail Pool, Inc., a Florida Corporation; U. S. & FOREIGN MANAGEMENT, LTD., a New York Corporation; U. S. & FOREIGN MANAGEMENT, INC., a Florida Corporation, BARBARA MURPHY, as Receiver for Each of said Corporations; USAFORM Pan-American, Ltd.,
a Delaware Corporation,

Petitioners,

-vs-

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
a Maryland Corporation,

Respondent.

RESPONSE TO PETITION FOR CERTIORARI BY FIDELITY AND DEPOSIT COMPANY OF MARYLAND

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. 1339

AMERICAN EMPIRE INSURANCE COMPANY OF SOUTH DAKOTA, a South Dakota Corporation, on Behalf of Itself and All Other Insurance Companies Who Were Shareholders in the USAFORM Hail Pool, STUYVESANT INSURANCE COMPANY, a New York Corporation, on Behalf of Itself and All Other Insurance Companies Who Employed U. S. & Foreign Management, Ltd. and USAFORM Pan-American, Ltd. as Reinsurance Brokerage Agents; USAFORM Hail Pool, Inc., a Florida Corporation; U. S. & FOREIGN MANAGEMENT, LTD., a New York Corporation; U. S. & FOREIGN MANAGEMENT, INC., a Florida Corporation, BARBARA MURPHY, as Receiver for Each of said Corporations; USAFORM Pan-American, Ltd.,
a Delaware Corporation,

Petitioners,

-vs-

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
a Maryland Corporation,

Respondent.

RESPONSE TO PETITION FOR CERTIORARI BY FIDELITY AND DEPOSIT COMPANY OF MARYLAND

No *special and important reason* is assigned by the Petitioners in their brief, as required by Rule 19 of this Court to require the Court to exercise its sound judicial discretion in granting the writ. In Petitioners' brief, pages 14 through

17, an attempt is made to state reasons, six in number, for granting the writ. The insufficiency will be pointed out:

1. The decision, by the United States Court of Appeals for the Fifth Circuit, is not in direct conflict with any decision of this Court and particularly with *Home Insurance Co. v. Baltimore Warehouse Co.*, 93 U. S. 527, S.Ct. 527, 548 and 23 L.Ed. 868, or *California Insurance Co. v. Union Cypress Co.* 133 U.S. 387, 10 S.Ct. 365, 33 L.Ed. The Home Insurance Co. case supports the Respondent's position:

> "If the merchandise be destroyed by fire, the assured may recover the entire value of the goods not exceeding the sum insured, holding the remainder of the amount recovered, after satisfying their own loss as trustees for the owners." (2d headnote)

The California Insurance Co. also supports the Respondent's position:

> "A person may insure in his own name goods held by trust by him and can recover for their entire value, holding the excess over his own interests in them for the benefit of those who have entrusted the goods to him." (2d headnote)

No decision has been made by the District Court or by the Court of Appeals *on the liability* of the F & D to its named insureds. If a named insured recovers, then the language of the above case is applicable - - - - the insured then will hold as trustee any amount due the pool participants. The Court of Appeals so held:

> "Intervenors' attempt to prognosticate the outcome of a trial on the merits of F & D's liability to the named insureds in the bond gives us little pause. F & D's liability vel non has not been decided by the District

> Court and is not now before this Court. Whether the underwriter may or may not have a defense against its named insureds is not relevant in considering F & D's liability to the Pool Participants as third party beneficiaries of the bond." (A. 10)

2. The decision, by the United States Court of Appeals for the Fifth Circuit is not in direct conflict with *Aetna Insurance Co. v. Eisenberg*, (9th C.A.), 294 F.2d 301. That fire insurance policy had not only a named insured, but was obtained under a contract which required the named insured to procure insurance for customers. This is not our factual situation; our Respondent, the F & D, positively refused to issue any bond to the Intervenor-Petitioners.

In the Aetna case, it is stated:

> "It seems perfectly clear that the policy here was a third-party beneficiary contract . . . . it does indeed insure Saul Eisenberg . . . . but it insures him for his account and 'for the act of customers hereinafter described.' The policy provided for the insurance of the Storage Receipts to the customers and for the insurance therein. The Storage Receipts covered only the property of the third-party beneficiaries, the intervenors."

'No conflict exists; because as will be shown in our discussion of the petitioners' reason, "3." next following herein, the law of the State of Florida and not the law of Arkansas is applicable. The decision by the Court of Appeals is based upon Florida law (A. 14): *American Surety Company of N. Y. v. Smith*, (Fla. 1930), 100 Fla. 1012, 130 So. 440; *Leon v. Kerrison*, 47 Fla. 178, 36 So. 173; *Wright v. Terry*, 23 Fla. 160, 2 So. 6; 7 Fla. Juris, 169, Contracts Section 101; *First National Bank of St. Augustine, et al v. Perkins*, Fla. 1921, 81 Fla. 341,

87 So. 912; *Punta Gorda Bank v. State Bank of Ft. Meade,* Fla. 1907, 52 Fla. 399, 42 So. 846.

We emphasize the Respondent, F & D, not only did not insure the pool participants, but positively refused to insure them.

3. The decision, by the United States Court of Appeals for the Fifth Circuit is in accord with the law of Florida. The reference to "general law" necessarily means the Florida law. This general law is found in decisions by the Florida courts and in decisions by our Court of Appeals applying the Florida law. Florida cases sustaining the decision are found in the decision. (A. 14, A. 15)

The Florida rule is accurately stated in *First Nat. Bank of St. Augustine, et al v. Perkins et al,* (S. Ct.), 87 So. 912:

> "In order that a promise made by one person to another for the benefit of a third person shall constitute the first the debtor of the third and entitle the third person to sue the first on such promise, it must appear that there was a clear intent upon the part of both the first and the second that the first person shall become such debtor. The mere fact that the third might be benefited is not sufficient."

The Court of Appeals relied only on these Florida decisions. It correctly ruled; only the named insured had any right under the bond of the Respondent. It confirmed an intent to benefit third parties must be clearly expressed and found that this intent had not been *so expressed* in the bond of the Respondent:

> "Since contracting parties are presumed to act for themselves, such an intent to benefit should be clearly expressed in the contract." (A. 14) *American Surety Co.*

of New York v Smith, (Fla. 1930), 130 Fla. 1012, 130 So. 440.

The opinion by Mr. Justice Brannar in *Appalachian Power Company v. American Institute of Certified Public Accountants*, (N.Y. 1959), 80 S.Ct. 16, 4 L.Ed.2d 30 states the position of this Court when a determination of state law has been made by the District Court and the Court of Appeals:

> "The petitioners state that three contentions will be raised. One is that the District Court and the Court of Appeals erred in their conclusion as to the relevant state law but this Court ordinarily accepts the determination of state law as found by the Court of Appeals particularly when, as here, the same finding is made by the District Court and no showing has been made to persuade me that such would not be the case here."

In *Wichita Royalty Co. v. City National Bank of Wichita Falls*, 306 U.S. 103, 83 L.Ed. 515, this Court said:

> "It was the duty of the federal court to apply the law of Texas as declared by its highest court."

As Florida law is applicable and the Court of Appeals correctly applied the Florida law, the decision need not be reviewed by certiorari.

4. The decision, by the United States Court of Appeals for the Fifth Circuit, correctly applied the Federal Rules of Civil Procedure. As no factual or contractural basis is presented, which required the application of Rule 17(a), the decision is correct. As the Florida decisions control the rights of a person or party to institute a suit on the fidelity bond, only the named insureds are proper parties. No other parties can assert any claim as a real party in interest under the rule referred to.

We have referred to these decisions heretofore. As no genuine issue as to any material fact existed, it was proper for the Court to enter the summary judgment. Rule 17(a) can have no application when the Florida decisions squarely hold the Intervenors have no rights under the bond involved in the litigation. Nowhere in the record is there any evidence that the Respondent ever communicated with the Intervenor-Petitioners. The evidence before the Court established positively the refusal by Respondent to name any one except the parties actually written in the bond as named insureds. The underwriter, whose testimony was never contradicted, established this. His letter (R. 65) stated:

> "We cannot extend the bond to the Pool's participants since they do not qualify as 'Joint Insureds'. Our liability is confined to --- (the named insured) and we cover only the losses which it may sustain through acts covered by the bond . . . The Pool's participants are not eligible to be Joint Insureds under the bond under our rules because to include them as such would make the bond liable for the act of their employees, ..."

The Intervenor-Petitioners seek to eliminate all of these "nots" in the letter, distorting it to be a positive rather than a negative declaration. (R. 65) These "nots" are restated with underlining added:

> "We can*not* extend the bond to the Pool's participants since they do *not* qualify as 'Joint Insureds'.
>
> ". . . is covered by the bond but *not* directly in favor of the Pool's participants.
>
> ". . . are *not* eligible to be Joint Insureds under the bond."

The Respondent emphasizes that this litigation involves a

fidelity bond. It does not involve a fire insurance policy on particular items of personal property. It did not cover bales of ten dollar bills or stacks of silver dollars. The fidelity bond does not provide coverage for *property* that has been destroyed or lost. It provides only fidelity protection. If a fidelity loss occurs this loss is represented by a bookkeeping entry but it is not represented by any loss of specific property.

This distinguishes the case of Globe and *Rutgers Fire Insurance Co., et al v. U.S.*, 5 Cir. 1953, 202 F. 2d 696. The Court of Appeals so found:

> "We are of the firm view that the F & D's contract meant just exactly what it clearly said, that is, that it insured the named corporations and those corporations only, against the defalcations of their employees. We can find no support for the intervenors' contention that the District Court should rewrite the contract."

We dispute certain false and misleading statements made by the Intervenor-Petitioners in their Petition. (Pet. 5). It is stated, "The thief was the sole stockholder...". Again, it is stated, "Whether the action had to be brought by the named insured, who was the thief...". The Petition for Writ of Certiorari refers to personnel of the Intervenor-Petitioners as "sophisticated insurance company executives". It seems odd that these sophisticates should inject an issue which is not established by the record. Nowhere in the record is:

a. A criminal judgment determining any one is a thief,

b. A civil judgment determining any one is a thief,

c. A contract indicating any one is a thief,

d. A stipulation that any one is a thief,

e. An indication of why Florida Statute 626.0605 (Pet. 4) relating to misrepresentation is presented to this Court.

The statement seems to be a figment flowing from a failure by the sophisticates to adequately protect themselves.

The F & D has never accepted as true any loss under the bond by thievery or otherwise. The record discloses no proof of thievery. The record does show by the Respondent's Vice President, Mr. Barnett: (R. 212)

> "No, we don't know that there was any dishonesty on Mr. Clarke's part. What we are saying is that the receiver is claiming dishonesty and based on his claim we turned it down on the theory that if there was any dishonesty it was known to the corporation head."

As Respondent, F & D, never has recognized any act that would subject it to any liability, particularly a theft, and as no reference is made in Support of the statement in the Petition establishing its truth, it appears to present an issue yet to be tried in the District Court. It is not an issue here.

5. The decision, by the United States Court of Appeals for the Fifth Circuit, necessarily determined the issue of punitive damages as *presented by the pleadings in the record.* (R. 101-107, R. 111-113, R. 113-114, R. 119-120) The Intervenor-Petitioners, by reference to other counts in the record, added allegations to counts V, X and XI. These three counts will be discussed separately.

To count V (R. 13-114) is added certain paragraphs in count I. Without copying all of the allegations so brought forward into count V, we emphasize these:

> "2. Pursuant to this Court's Order . . . . American Empire Insurance Company . . . appears on behalf of itself and all other insurance companies who were share-

holders in said USAFORM Hail Pool, referred to herein as 'pool participants' . . ." (R. 101)

"(b) That on February 1, 1962, plaintiff replied to Clarke's letter giving assurances that the pool participants' money was fully protected and insured by said bond." (R. 106)

"14. That by virtue of the January 16, 1962 letter from Clarke and plaintiff's reply of February 1, 1962, the pool participants were named insureds under said Bond as to moneys or other properties, deposited with USAFORM Hail Pool, Inc." (R. 106-107)

"15. . . . . or otherwise misappropriate . . . premium moneys on deposit . . . . belonging to the pool participants . . ." (R. 107)

Furthermore, count IV is brought forward by reference into count V. (R. 111) In count IV is paragraph 5:

"5. . . . . and plaintiff never intended to cover Clarke under said Bond, and never intended to extend coverage to the pool participants." (R. 111)

Also see paragraphs 7 and 9 in count IV:

"7. Plainitff made the aforedescribed representations with the intent to deceive the named insureds and the pool participants, ... for the purpose of inducing the pool participants to deposit premium monies with the named insureds." (R. 112)

"9. That by reason of the plaintiff's aforesaid fraudulent representations, acts and conduct, the pool participants have been damaged in the sum of $311,624.58. . . . that by reason of the foregoing plaintiff should pay the pool participants punitive or exemplary damages."

So count V, with these additions by reference, asserts claims for the Intervenor-Petitioners. The Court of Appeals properly decided that pool participants' claims were intended to be disposed of as asserted in count V. As the Intervenor-Petitioners had no legal claim, the question of damages, and particularly punitive damages, became unimportant. This was the decision: The Court of Appeals dealt with the pleadings presented to it which pleadings asserted claims on behalf of pool participants.

We emphasize, the Intervenor-Petitioners purposely intermingled and co-joined all their claims. Any decision made by the Court of Appeals had to be based on their rights as asserted in the paragraphs from other counts made a part of count V.

Count X makes reference to count VI. Count VI likewise makes reference to paragraphs in count I. These references bring in claims that are asserted on behalf of the Intervenor-Petitioners; consequently, the same problem is presented here as was presented with respect to count V. The Court of Appeals correctly determined the Intervenor-Petitioners had no legal rights and, therefore, the question of damages was unimportant.

Count XI likewise uses the reference method. (R. 120) It brings in count X and, of course, count X brought in count VI. This makes count XI and count X the same except for the change of name of a party. With this type of pleading before the Court of Appeals, it legally determined that the rights of Intervenor-Petitioners were co-mingled in this count, as they were in counts V and X; and as Intervenor-Petitioners had no legal rights under the bond,damages became of no consequence.

6. The decision, by the United States Court of Appeals for the Fifth Circuit, legally granted the partial summary judgment pursuant to the Federal Rules of Civil Procedure, Rule 56. The Florida Rules of Civil Procedure were not applicable.

The decisions from Florida courts cited by the Intervenor-Petitioners relating to summary judgments under Florida Rules of Civil Procedure are unimportant and are not controlling. As this suit is in the United States District Court, it is controlled only by the Federal Rules of Civil Procedure. It is in conformity with decisions construing these Rules: In *Bruce Construction Corp. v. United States of America for use of Westinghouse Electric Supply Company,* (5th C.A.), 242 F.2d 873, the Federal Rule is answered and is applicable:

> "But, equally vigorous in giving full range to this mechanism, we have just as consistently rejected any notions that pretense, or apparent formal controversy can thwart application of this rule or hamstring the court in determining whether it is a proper case for it Consequently, when a movant makes out a convincing showing that genuine issues of fact are lacking, we require that the adversary adequately demonstrate by receivable facts that a real, not formal, controversy exists, and, of course, he does not do that by mere denial or holding back evidence."

In *National Screen Service Corp. v. Poster Exchange, Inc.,* (5th C.A.) 305 F.2d 647, it is said:

> "We come first to a consideration of the applicable principles relating to summary judgments under Federal Rule of Civil Procedure 56, 28 U.S.C.A. The law is well settled that in order to entitle the moving party to summary judgment, it must be clearly shown: (1) that there is no genuine issue as to any material fact

in the case; and (2) that he is entitled to a judgment in his favor as a matter of law."

In *Boyce v. United States of America,* (5th C.A.), 373 F.2d 794, it is stated:

> "We agree with the trial court that this defense does not raise a material issue of fact requiring submission of the case to a jury. There is only a legal question to resolve. . . . The trial court correctly entered a summary judgment for the United States."

The District Court found that under the Rules:

> ". . . the pleadings, depositions and affidavits on file show that there is no genuine issue as to any material fact that in law would permit the recovery of punitive damages under any one of the counterclaim counts against the Fidelity and Deposit Company and that it, as the plaintiff, is entitled to judgment as a matter of law insofar as each of said counterclaim counts seeks to recover punitive damages from the Fidelity and Deposit Company. . . . The Court further finds . . . . that there is no genuine issue as to any material fact that would sustain the right of any one of the intervenors . . . or the underwriters of pool participants, ... to recover under the bond. . . . either as a named insured or as a third party beneficiary protected by the bond, although not named therein as an insured." (R. 255)

The Court of Appeals affirmed this finding of no genuine issue as to any material fact. The Court of Appeals applied the law of Florida. This is correct. The Court of Appeals properly applied the Federal Rules of Civil Procedure. This is correct. The Court of Appeals properly interpreted the decisions of this Court and of the Court of Appeals for the Fifth

Circuit. This is correct. No conflict arose between this decision and a decision of another Court of Appeals on the same subject which was applicable to the questions involved requiring the application of Florida law. The law of Florida was applied by the Court of Appeals, as appears from the decision.

As all of the reasons asserted by Intervenor-Petitions were presented to the Court of Appeals originally and by their Petition for Rehearing, no reason exists for granting the Writ of Certiorari.

The Respondent, F & D, respectfully urges the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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PROOF OF SERVICE OF RESPONDENT TO WRIT OF CERTIORARI BY FIDELITY AND DEPOSIT COMPANY OF MARYLAND

Harry T. Gray hereby certifies that he is one of the attorneys of record for the Respondent and that on the ..... day of June, 1969 a true and correct copy of the foregoing response was deposited in the United States Post Office with first class postage prepaid at Jacksonville, Florida, addressed to counsel of record for the Petitioners, W. Warren Cole, Jr. of Black, Cobb, Cole, Crotty & Sigerson, 444 North Beach Street, Post Office Box 191, Daytona Beach, Florida.

.....

Harry T. Gray, as Attorney